

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAIIAN ELECTRIC COMPANY, INC.)
For Approval of Rate Increases)
And Revised Rate Schedules and)
Rules)
_____)

DOCKET NO. 2008-0083

ORDER DENYING MOTIONS TO INTERVENE AND MOTION FOR LEAVE
TO FILE A REPLY; DISMISSING AS MOOT MOTIONS TO APPEAR
AND MOTION FOR AN ENLARGEMENT OF TIME; RULING ON THE
COMPLETENESS OF HECO'S APPLICATION; AND DIRECTING THE
PARTIES TO FILE A STIPULATED PROCEDURAL ORDER WITHIN THIRTY DAYS

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COMMISSION

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COMPLETENESS OF HECO'S APPLICATION; AND DIRECTING THE
PARTIES TO FILE A STIPULATED PROCEDURAL ORDER WITHIN THIRTY DAYS

By this Order, the commission denies: (1) Motion to Intervene and Become a Party filed by WAL-MART STORES, INC. and SAM'S WEST, INC. (jointly, "Wal-Mart") on August 20, 2008 ("Wal-Mart's First Intervention Motion"); (2) Motion to Intervene and Become a Party filed by Wal-Mart on September 2, 2008 ("Wal-Mart's Second Intervention Motion"); (3) Motion to Intervene and Become a Party filed by HAWAII COMMERCIAL ENERGY CUSTOMER GROUP ("Commercial Group") on September 29, 2008 ("Commercial Group's Intervention Motion"); and (4) Commercial Group's Motion for Leave to File Reply to HAWAIIAN ELECTRIC COMPANY, INC.'s ("HECO") Memorandum in Opposition to Commercial Group's Intervention Motion, filed on October 21, 2008.

The commission further dismisses as moot: (1) Motion to Appear on Behalf of Wal-Mart, filed on August 20, 2008 ("Wal-Mart's Motion to Appear"); (2) Motion to Appear on Behalf of the Commercial Group, filed on September 29, 2008

("Commercial Group's Motion to Appear"); and (3) HECO's Motion for Enlargement of Time to File a Memorandum in Opposition to Wal-Mart's Second Intervention Motion, filed on October 13, 2008.

In addition, the commission finds that HECO'S application¹ is complete and properly filed under Hawaii Revised Statutes ("HRS") § 269-16(d) and Hawaii Administrative Rules ("HAR") § 6-61-87. Thus, the filing date of HECO's completed Application is July 3, 2008. The commission also instructs HECO, the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"),² and the DEPARTMENT OF THE NAVY on behalf of the DEPARTMENT OF DEFENSE ("DoD") (collectively, the "Parties") to submit a stipulated procedural order for the commission's review and consideration, within thirty days from the date of this Order. Alternatively, if the Parties are unable to stipulate to a procedural order, each Party shall submit a proposed procedural order for the commission's consideration by the same date.

I.

Background

On July 3, 2008, HECO filed its Application for approval of rate increases and revised rate schedules and rules in which HECO seeks a general rate increase of approximately

¹See HECO's Application for Approval of Rate Increases and Revised Rate Schedules and Rules, filed on July 3, 2008 ("Application").

²The Consumer Advocate is an ex officio party to this proceeding pursuant to HRS § 269-51 and HAR § 6-61-62.

\$97,011,000, or 5.2%, over revenues at current effective rates. Revenues at current effective rates include revenues from the interim rate increase approved by the Commission on June 20, 2008 in its Order Granting HECO's Motion to Adjust Interim Increase Filed on May 21, 2008 in HECO's 2007 test year rate case (Docket No. 2006-0386). If revenues from the interim rate increase are excluded, the requested relief over revenues at present rates is estimated to be \$174,348,000. The requested increase is based on estimated total revenue requirements of \$1,964,401,000 for the normalized 2009 test year, based on April 2008 fuel oil and purchased energy prices, and an 8.81% rate of return on HECO's rate base, including the full cost of HECO's Campbell Industrial Park Combustion Turbine Unit 1.

On July 29, 2008, DoD filed a Motion to Intervene and Become a Party in this docket, in response to which no oppositions were filed. By Order filed on August 20, 2008, the commission granted intervention to DoD.

On September 18, 2008, the commission held a public hearing on the Application at the commission's hearing room in Honolulu, Hawaii. Pursuant to HAR § 6-61-57(1), the deadline for filing motions to intervene or participate in this docket was ten days after the public hearing, or on September 29, 2008.

II.

Discussion

A.

Intervention and Related Motions

HAR § 6-61-55 sets forth the requirements for intervention in commission proceedings. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.
- (b) The motion shall make reference to:
 - (1) The nature of the applicant's statutory or other right to participate in the hearing;
 - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
 - (3) The effect of the pending order as to the applicant's interest;
 - (4) The other means available whereby the applicant's interest may be protected;
 - (5) The extent to which the applicant's interest will not be represented by existing parties;
 - (6) The extent to which the applicant's participation can assist in the development of a sound record;
 - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;

- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b).

HAR § 6-61-55(d) further states that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." In addition, the Hawaii Supreme Court has stated the general rule on intervention as follows: "Intervention as a party in a proceeding before the [commission] is not a matter of right but is a matter resting within the sound discretion of the commission." In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

Here, Wal-Mart filed its First Intervention Motion on August 20, 2008.³ In Wal-Mart's First Intervention Motion, which is approximately three pages long, Wal-Mart states that it is a large retailer with five facilities in HECO's service territory, including Wal-Mart Discount stores and a Sam's Club. Wal-Mart asserts that as a large customer of HECO that uses approximately 23,000,000 kWh/year, HECO's Application "could dramatically impact Wal-Mart's cost structure for procuring the

³On the same day, Wal-Mart filed its Motion to Appear, requesting permission for out-of-state counsel, Holly Rachel Smith, Esq. of Russell W. Ray, PLLC, to appear in this docket in conjunction with Wal-Mart's local counsel, Bruce D. Voss, Esq. and Lori N. Tanigawa, Esq. of Bays Deaver Lung Rose & Holma.

energy it requires to operate in Hawaii."⁴ Presumably in response to HAR § 6-61-55(b)(5), Wal-Mart states: "It is not unlikely that Wal-Mart's position may be different from those advocated by HECO, the Consumer Advocate, or any other party to the instant proceeding."⁵ Furthermore, Wal-Mart contends that its intervention would serve the public interest to the extent that Wal-Mart seeks to ensure that the rate design and implementation of any rate increase adopted in this docket is distributed fairly across all customer classes.

On August 27, 2008, HECO filed a Memorandum in Opposition to Wal-Mart's First Intervention Motion. HECO opposes the First Intervention Motion by arguing that: (1) the very general interest that Wal-Mart alleges it has in this proceeding will be adequately represented by the Consumer Advocate; (2) Wal-Mart's intervention as a party will not contribute in any significant way to the development of a sound record regarding the reasonableness of HECO's proposed rate increase; and (3) Wal-Mart's intervention as a party would unduly delay the proceedings and unreasonably broaden the issues presented in this docket.⁶ In support of its first point, HECO specifically contends:

Finding that the Consumer Advocate will appropriately represent the interests of HECO customers in this proceeding, including Wal-Mart, is also consistent with the "just,

⁴Wal-Mart's First Intervention Motion at 2.

⁵See id. at 3.

⁶See HECO's Memorandum in Opposition to Wal-Mart's First Intervention Motion, filed on August 27, 2008, at 1-2.

speedy and inexpensive determination of every proceeding," which is the purpose of the Commission's Rules of Practice and Procedure as stated in H.A.R. §6-61-1. In contrast, allowing party intervention on the basis of very general allegations of the sort made by Wal-Mart would set a poor precedent. Allowing every entity that is a customer of a utility to intervene is not reasonable, would be contrary to the Legislature's intent that the Consumer Advocate represent the interests of utility consumers, and would not result in the "just, speedy and inexpensive determination of every proceeding."⁷

Subsequently, on September 2, 2008, Wal-Mart filed a Notice of Withdrawal of the First Intervention Motion, while contemporaneously filing its Second Intervention Motion. No oppositions were filed in response to Wal-Mart's Second Intervention Motion.⁸ The Second Intervention Motion, which is approximately six pages long, provides additional support for Wal-Mart's request to intervene in this proceeding.⁹

On September 29, 2008, the Commercial Group filed its Intervention Motion.¹⁰ The members of the Commercial Group are: Maui Divers of Hawaii, Limited; Safeway Inc.; Sam's West, Inc.;

⁷See id. at 6-7.

⁸As discussed further below, however, HECO was apparently not properly served with Wal-Mart's Second Intervention Motion.

⁹For example, in support of its position that its interest will not be represented by existing parties (i.e., the Consumer Advocate), see HAR § 6-61-55(b)(5), Wal-Mart provides one sentence in the First Intervention Motion, quoted above; whereas Wal-Mart expands on this argument in at least two paragraphs in the Second Intervention Motion.

¹⁰On the same day, the Commercial Group filed its Motion to Appear, requesting permission for the same out-of-state counsel as Wal-Mart, Holly Rachel Smith, Esq., to appear in this docket in conjunction with the Commercial Group's local counsel, Joseph A. Stewart, Esq. of Kobayashi Sugita & Goda.

Step Three, Ltd., dba Sandal Tree; the Retail Merchants of Hawaii Inc.; and Wal-Mart Stores, Inc.¹¹ The Commercial Group further describes itself as comprised of "multiple small medium and large sized commercial customers of HECO."¹² In addition, the Commercial Group states that its members have collectively over fifty-six facilities in HECO's service territory, including grocery stores, department stores, discount stores, specialty stores, and wholesale clubs. The Commercial Group relies on HECO to supply more than 67,950,000 kWh/year of energy.¹³

As to the Commercial Group's interest in this proceeding, it states:

HECO proposes to significantly increase these electricity rates. Inasmuch as the issues in this docket directly affect the rate schedules under which members of the Commercial Group purchase energy, HECO's request for a rate increase could dramatically impact the Commercial Group's collective cost of energy. Accordingly, this docket will directly and substantially affect the operating expenses of the members of the Commercial Group through rate impacts.¹⁴

The Commercial Group claims that its members have energy departments that work in all facets of energy and utility management. Moreover, the Commercial Group believes that its interests are different from those of the general public, and that the "circumstances of some dockets make it difficult for

¹¹See Commercial Group's Intervention Motion at 2. By letter filed on October 3, 2008, the Commercial Group supplemented its Motion to add Macy's, Inc. to the Commercial Group.

¹²See Commercial Group's Intervention Motion at 3.

¹³See id. at 4.

¹⁴Id.

the Consumer Advocate to simultaneously represent large commercial customers and all other members of the general public, each of which has their own class and different cost of service scenarios."¹⁵

On October 1, 2008, Wal-Mart filed a Notice of Withdrawal and Substitution of Counsel ("Notice of Withdrawal"), in which Wal-Mart expressed its "wishes to substitute Joseph A. Stewart of Kobayashi, Sugita & Goda, for Bruce Voss and Lori Tanigawa of Bays Deaver Lung Rose & Holma, as local counsel in this proceeding[.]"¹⁶ The Notice of Withdrawal added that:

Wal-Mart is a member of the Commercial Group. Wal-Mart would like to inform this Honorable Commission that upon grant of the Commercial Group's intervention request, Wal-Mart will participate in this docket through the Commercial Group. Further, upon approval of the intervention of the Commercial Group, Wal-Mart will withdraw its pending motion for intervention.¹⁷

On October 7, 2008, HECO filed a Memorandum in Opposition to the Commercial Group's Intervention Motion.¹⁸ HECO opposed the Commercial Group's Intervention Motion on the following grounds: (1) the Commercial Group's interests with

¹⁵Id. at 7.

¹⁶Notice of Withdrawal at Paragraph 1. Although the cover page of the Notice of Withdrawal lists Joseph A. Stewart and Holly Rachel Smith as "Attorneys for the Hawaii Commercial Energy Customer Group," the signature page of the Notice of Withdrawal lists Mr. Stewart and Ms. Smith as "Appearing Counsel for Wal Mart Stores, Inc. and Sam's West, Inc."

¹⁷Id. at Paragraph 2.

¹⁸HECO noted several deficiencies in service of the Commercial Group's Intervention Motion and Motion to Appear, which were filed on September 29, 2008. See HECO's Memorandum in Opposition to the Commercial Group's Intervention Motion at 1-2 n.1.

respect to general rate case issues (i.e., revenues, expenses, rate base, rate of return, cost of service and rate design) can be adequately represented by the Consumer Advocate; (2) the Commercial Group has not demonstrated that its participation would assist in the development of a sound record regarding the reasonableness of HECO's proposed rate increase;¹⁹ (3) the Commercial Group has not shown that it should be granted full-party status in this proceeding, given its limited interest in the primary issues in a general rate increase proceeding (i.e., the revenue requirements issues); and (4) a movant should not be permitted to file alternative motions to intervene in the same proceeding.

More particularly, HECO pointed out that, according to its information and belief, the Commercial Group is composed of small, medium, and large customers on various rate schedules, including: Schedule G (General Service on Demand), Schedule J (General Service Demand), Schedule PP (Large Power Primary Voltage Service), and Schedule PS (Large Power Secondary Voltage Service). To this end, HECO argues:

At any rate, the Commercial Group does not appear to represent a discrete group of commercial customers whose interests will not be represented by the Consumer Advocate. To the contrary, the diverse and diluted composition of the Commercial Group (which is apparently composed of small, medium and large; domestic and foreign; for-profit and nonprofit businesses, including "grocery stores, department stores, discount stores,

¹⁹Specifically, HECO argued that the Commercial Group did not identify any of its potential witnesses, or alleged experience with rate case proceedings that would contribute to the development of a sound record regarding general rate case issues.

specialty stores and wholesale clubs") generally represents a cross section of Hawaii's commercial utility customers.²⁰

Furthermore, with regard to its argument against "alternative motions," HECO contends:

Thus, Wal-Mart has involved itself in two parallel motions to intervene (i.e., the Wal-Mart Motion and the Commercial Group Motion), being brought under two different theories (i.e., (1) that Wal-Mart should be allowed to intervene by virtue of being a "large retail Customer," and (2) that Wal-Mart should be allowed intervention by virtue of its membership in a group "comprised of small [sic] medium and large sized commercial customers of HECO,"), and in at least two different capacities (i.e., (1) as Wal-Mart, and (2) as a Commercial Group member).

Such filing tactics could result in numerous motions to intervene by the same movant under different "organized groups or persons." For example, given that a Motion to Intervene can be filed by any "organized group[] of persons, whether incorporated or not," a party seeking intervention in a rate case could, using tactics similar to Wal-Mart's, file numerous motions to intervene as members of different organized groups. This is undesirable for a number of reasons. First, the filing of multiple motions to intervene by the same movant would not result in a just, speedy and inexpensive determination of proceedings before the Commission. For instance, there could be multiple motions to intervene to be ruled upon by the Commission. In addition, the applicants would have to file multiple memoranda in opposition to the motions to intervene.

This could lead to a "trial and error" approach to motions to intervene. This would put the utility in a situation where it must respond to motion after motion. Each response to a motion to intervene would provide a new road map for additional motions to be filed with and considered by the

²⁰HECO's Memorandum in Opposition to the Commercial Group's Intervention Motion at 13 (footnote omitted).

Commission. This is not an efficient use of the resources of the Commission or the applicants.²¹

On October 13, 2008, HECO filed its Motion for Enlargement of Time to File a Memorandum in Opposition to Wal-Mart's Second Intervention Motion ("HECO's Enlargement Motion"). In HECO's Motion, it explained that it did not timely file an opposition to Wal-Mart's Second Intervention Motion because it was not served with that motion; nor was it served with Wal-Mart's Notice of Withdrawal of Wal-Mart's First Intervention Motion.²²

On October 16, 2008, Wal-Mart filed a Statement of No Opposition to HECO's Enlargement Motion, in which Wal-Mart represented that the Second Intervention Motion was served by first-class mail on HECO on September 2, 2008, but was not served on HECO's counsel. Wal-Mart states: "to the extent that HECO's failure to timely respond was the result of either a failure in the mail or a result of any omission by Wal-Mart, HECO should not be prejudiced by such occurrences."²³

On October 21, 2008, the Commercial Group filed a Motion for Leave to File Reply to HECO's Memorandum in Opposition to the Commercial Group's Intervention Motion

²¹Id. at 17-18 (footnotes omitted).

²²See Declarations attached to HECO's Motion. According to HECO, neither its duly appointed representatives nor its counsel were served with Wal-Mart's Second Intervention Motion or the Notice of Withdrawal. HECO obtained copies of both filings from the commission on October 10, 2008.

²³Wal-Mart's Statement of No Opposition, filed on October 16, 2008, at 1.

("Commercial Group's Motion for Leave"). In this motion, the Commercial Group sought permission to submit supplemental information in response to HECO's opposition to the Commercial Group's Intervention Motion "as to the identification and credentials of the expert witness it has retained to testify on cost-of-service and rate design issues in this proceeding."²⁴

Upon review of the Intervention Motions, the related filings thereto, and the entire record, the commission is convinced that intervention should be denied to Wal-Mart and the Commercial Group. First, regarding Wal-Mart, after Wal-Mart filed its First Intervention Motion and HECO filed its opposition to that motion, Wal-Mart simultaneously withdrew the First Intervention Motion and, through its Second Intervention Motion, filed an improved version of its First Intervention Motion. In addition, Wal-Mart appears to have failed to properly serve HECO with the Second Intervention Motion and the Notice of Withdrawal.

In the commission's view, Wal-Mart's conduct thus far, quite simply, is inconsistent with the "just, speedy, and inexpensive determination" of this proceeding."²⁵ Parties should not be able to file alternative motions as Wal-Mart did, as it is wasteful of the commission's and the utilities' resources.

As to Wal-Mart's First Intervention Motion, Wal-Mart withdrew that motion (and appears to have failed to

²⁴Commercial Group's Motion for Leave at 1-2. On October 28, 2008, HECO opposed the Commercial Group's Motion for Leave.

²⁵HAR § 6-61-1.

properly serve HECO with the Notice of Withdrawal). Even if the commission were to consider the First Intervention Motion on its merits, the commission would deny the motion, as the support provided by Wal-Mart is conclusory and brief (i.e., less than two pages of substantive support is provided in the First Intervention Motion). With respect to Wal-Mart's Second Intervention Motion, it is, as noted above, an improved version of its First Intervention Motion. Accordingly, the commission will treat Wal-Mart's Second Intervention Motion as an unauthorized Reply Memorandum under its rules and will deny the motion.²⁶ Given the commission's denial of both of Wal-Mart's intervention motions, the commission dismisses as moot Wal-Mart's Motion to Appear, and HECO's Enlargement Motion.

The commission finds the same flaws with the Commercial Group's Intervention Motion. As noted by HECO, a party seeking intervention should not be able to file alternative, parallel motions to intervene in different capacities and based on different theories. This would inevitably force the commission, as it has here, to rule on multiple motions and opposition memoranda, and is clearly contrary to the commission's obligation to ensure the "just, speedy, and inexpensive determination of every proceeding."²⁷

There are additional concerns with the Commercial Group's Intervention Motion. The Commercial Group does not

²⁶The commission's rules allow opposition memoranda to be filed in response to motions, but do not permit the filing of reply memoranda in support of motions. See HAR § 6-61-41.

²⁷HAR § 6-61-1.

appear to represent a discrete group of commercial customers who will not be adequately represented by the Consumer Advocate. To the contrary, the composition of the Commercial Group appears diverse and diluted with members being small, medium, and large commercial customers, including "grocery stores, department stores, discount stores, specialty stores and wholesale clubs."²⁸ The Commercial Group also appears to represent a non-profit organization, the Retail Merchants of Hawaii Inc., and the record is unclear as to who the members of this group are. In general, the Commercial Group appears to represent a cross-section of HECO's commercial customers. Given the ambiguity of the Commercial Group's members and their diverse interests, intervention by the Commercial Group would not lead to the development of a sound record, and would likely confuse the issues and delay this proceeding. Moreover, there is no indication in the record that the Consumer Advocate will not adequately represent the interests of the Commercial Group's members.²⁹ For all of these reasons, the Commercial Group's Intervention Motion is denied. In addition, given the denial of the Commercial Group's Intervention Motion, the Commercial Group's Motion to Appear is dismissed as moot.

²⁸Commercial Group's Motion to Intervene at 4. Moreover, a business records search with the State of Hawaii Department of Commerce and Consumer Affairs indicates that the Commercial Group is not a registered business entity in Hawaii.

²⁹Pursuant to HRS § 269-51, the Consumer Advocate "shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services." [Emphasis added.]

As to the Commercial Group's Motion for Leave, as mentioned above, the commission's rules do not permit the filing of reply memoranda, and based on the circumstances outlined above, the commission finds no good cause to grant leave to do so in this case. Thus, the Commercial Group's Motion for Leave is denied.

B.

Completed Application

Upon review of the Application, and there being no objection to the completeness of the Application,³⁰ the commission finds that the Application is complete and properly filed under HRS § 269-16(d) and HAR § 6-61-87. Accordingly, the filing date of HECO's completed Application is July 3, 2008.

C.

Stipulated Procedural Order

HRS § 269-16(d) requires the commission to "make every effort to complete its deliberations and issue its decision as expeditiously as possible and before nine months from the date the public utility filed its completed application[.]" For this reason, the commission finds it prudent to require the Parties

³⁰Under HRS § 269-16(d), the Consumer Advocate may object to the sufficiency of any application for a rate increase, within twenty-one days after receipt of the application. The Consumer Advocate did not file any statement as to the completeness of the Application.

to: (1) initiate the discovery process forthwith; and (2) submit a stipulated procedural order setting forth the issues and procedures to govern this proceeding, within thirty days from the date of this Order.

Based on the commission's finding above that the filing date of HECO's completed Application is July 3, 2008, the commission's nine-month deadline to issue its decision in this docket is April 3, 2009. Accordingly, the stipulated procedural order that the Parties submit to the commission should, to the extent possible, allow the commission to complete its deliberations and issue a decision by April 3, 2009. If the Parties are unable to stipulate to a stipulated procedural order, each Party shall submit a proposed procedural order for the commission's consideration by the same date.

III.

Orders

THE COMMISSION ORDERS:

1. Wal-Mart's First Intervention Motion is denied;
2. Wal-Mart's Second Intervention Motion is denied;
3. The Commercial Group's Intervention Motion is denied;
4. The Commercial Group's Motion for Leave is denied;
5. Wal-Mart's Motion to Appear is dismissed as moot;
6. The Commercial Group's Motion to Appear is dismissed as moot;

7. HECO's Enlargement Motion is dismissed as moot;
8. The filing date of HECO's completed Application is July 3, 2008; and
9. The Parties shall: (a) initiate the discovery process without delay; and (b) submit to the commission a stipulated procedural order, incorporating their agreed-upon schedule with respect to this proceeding, within thirty days from the date of this Order. The Parties stipulated procedural schedule should, to the extent possible, allow the commission to complete its deliberations and issue a decision by April 3, 2009. If the Parties are unable to stipulate to a stipulated procedural order, each Party shall submit a proposed procedural order for the commission's consideration by the same date.

DONE at Honolulu, Hawaii OCT 31 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

APPROVED AS TO FORM:

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Kaiulani Kidani Shinsato
Commission Counsel

By John E. Cole
John E. Cole, Commissioner

By Leslie H. Kondo
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2008-0083.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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